IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 70, 71

EDWARD KATZINGER COMPANY,
Petitioner,

vs.

CHICAGO METALLIC MANUFACTURING COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF.

CHARLES J. MERRIAM,
STANLEY HOODS,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 70, 71.

EDWARD KATZINGER COMPANY,

Petitioner,

vs.

CHICAGO METALLIC MANUFACTURING COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

Respondent's brief takes the position that there is no issue before this court. It urges that the only issue below was that of infringement, and says that no assignment of error was made as to this question. The contention has no basis in fact or in the record.

When the case was first tried in the District Court on the merits, the District Court found that Metallic's "Bake-King" ware was an infringement of Jackson patent 2,077,757. See Record 997, page 156.* The patent was held

* We designate the record of 70 by its original number of 997 and the record of 71 by its original number of 998 to conform with our brief filed herein.

valid because of an estoppel. On appeal, the Court of Appeals limited its decision to the estoppel, holding that there was no estoppel and remanding the case to the District Court to determine the validity of the patent. See Record 997, page 211.

When the case was tried on the remand, the District Court stated that the only question before it was the validity of the patent, saying, Record 998, page 11:

> "The only question now before this Court is the validity of Jackson Patent No. 2,077,757 when tested without the estoppel.
>
> "Considering the Jackson Patent on its merits and after a complete review of the prior art cited by the petitioner, I am of the opinion that Jackson Patent No. 2,077,757 is invalid as being fully disclosed in the prior art.
>
> "An appropriate decree so holding may be prepared by counsel for petitioner."

In accordance with this decision of the court, a final decree was entered which included the statement upon which Metallic bases its whole case. That statement will be found on page 16, Record 998, and is as follows:

> "(3) Patent #2,077,757 is invalid and of no force or effect.
>
> "(4) Defendant's charges of infringement of patent #2,077,757 under its counter-claim directed against Plaintiff's Bake-King tinware, are hereby dismissed for want of equity."

This is obviously not a finding of non-infringement as argued by Metallic, but a finding that the charges of in-

fringement must be dismissed because the patent is invalid.

When the case was appealed, the issues were identical. The statement of points on appeal as shown by pages 19 and 20, Record 998, of course did not include any mention of the point of infringement, and no point was made in the Appellate Court as to any deficiency of the statement of points on appeal.

The Court of Appeals paid no attention to the question of infringement, but simply decided the question of validity of the patent. See Record 998, pages 31-35.

Respondent's brief substantially ignores the real issues as to the estoppel before this court. It does require comment on one or two points:

1. On page 12 of the brief, it is said that both parties were engaged in interstate commerce. This is not borne out by the record. The fact that both parties operated in numerous states does not necessarily mean that they were engaged in interstate commerce, nor does the record show what the situation was at the time the contract was entered into. The burden was on Metallic to show such commerce and no effort was made to do so.

2. The list of record references at the bottom of page 14 of respondent's brief should include the testimony of Mr. Schrager, beginning with question 13 on page 51, Record 997.

Respectfully submitted,

CHARLES J. MERRIAM,
STANLEY HOODS,
Counsel for Petitioner.